Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

KAREN ANN F. KELLY,

Petitioner,

vs.

COUNTY OF ORANGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held, in conflict with decisions from the First, Tenth, and Eleventh Circuits, that a Title VII plaintiff claiming religious discrimination by means *inter alia* of threats and retaliation must prove that the employer's decision to transfer her was "sufficiently adverse" in tangible economic terms to make a *prima facie* case, absent which her evidence as to non-economic factors such as retaliatory animus, severe harassment and threats of discharge on account of her religious practice, observance and belief were disregarded.

2. Whether the decision below, affirming the grant of a directed verdict (judgment as a matter of law) against petitioner, pursuant to Federal Rule of Civil Procedure 50(a), conflicted in principle with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and usurped the role of the jury, in that the Courts below did not review all the evidence plaintiff adduced, did not draw all reasonable inferences in her favor, and failed to disregard all evidence favorable to the moving party that jurors would not have been required to believe.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-3a) is unreported. The order denying rehearing and rehearing *en banc* (App., 7a) is unreported. The district court's Judgment, entered May 1, 2002 (App., 5a-6a) is unreported, as was its oral ruling of April 10, 2002, granting respondent's motion for directed verdict (App., 10a).

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2004, and rehearing was denied on August 5, 2004 (App. 1a, 3a). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND FEDERAL CIVIL RULE INVOLVED

42 U.S.C., Section 2000e-2 of Title VII of the Civil Rights Act of 1964, as amended, provides in pertinent part:

§2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

* * *

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

* * *

42 U.S.C., Section 2000e-3(a) of Title VII provides in pertinent part that it is an unlawful employment practice for an employer "to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Federal Rule of Civil Procedure 50(a) provides in pertinent part, "If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

STATEMENT

This Title VII case presents in stark fashion a pair of salient questions that have caused persistent conflicts among the Circuit Courts and substantial disarray in the case law governing employment discrimination cases. Clearly, those cases arise with great frequency before the federal courts.

Petitioner, a registered nurse, was hired by the respondent County as a Comprehensive Care Nurse I ("CCN-I"). Assigned to Juvenile Hall, a probationary facility, housing youths in trouble with the law, she began her job on August 2, 1993. Though advised of her prospective duties on interviewing for the job, petitioner was never told – either orally or in written materials outlining job duties – that as a CCN-I she would be required to schedule abortion referrals or provide contraceptive counseling.

Yet, on being asked by a fellow nurse to schedule an abortion during her first month on the job, petitioner answered that she could not do so, only to be told that "[t]his is part of our job," and that she should talk to her supervisor, Kilby Williams, who testified that she told petitioner that making therapeutic abortion appointments was part of her job duties at Juvenile Hall.

Toward the end of September, 1993, Kilby Williams told petitioner that she would be required to take a course on HIV prevention. Shown the course materials, which included sexually explicit diagrams on use of condoms and dams, petitioner informed Ms. Williams that, although she was willing to take the training course and to teach abstinence as a means of preventing spread of the HIV virus, nonetheless as a practicing Roman

Catholic, petitioner objected as a matter of her religious faith to this teaching or advocacy of artificial contraception.

Shortly thereafter, two other nurses asked petitioner about her religious objections, having learned of them from Ms. Williams. Petitioner then went back to her supervisor, asking her, "Why did you tell them that, my personal beliefs?" Ms. Williams replied that the other nurses "would have found out anyway" because, "You would be fired, and they would have found out when you were fired if you continued to refuse to do this." (Excerpts of Record, "ER," vol. 4, TAB 2, at 140). Ms. Williams denied having told petitioner she would be fired. *Id.*

Then in mid-October, 1993, Ms. Williams asked petitioner if she was going to change her mind about teaching use of contraceptives, to which petitioner replied that she "would never change [her] mind on this" (ER, vol. 4, TAB 2, at 141). Petitioner testified that Ms. Williams told her "they were going to give me some time to try to change my mind and sort of accept the ways of the County teaching," but "when [Ms. Williams] finally understood that I was not going to change my beliefs, she turned it over" to higher authority, Carol Mosely. *Id.*

Later in October, 1993, Ms. Mosely spoke with petitioner, telling her that she "was a good nurse . . . even one of the best nurses at Juvenile Hall" and "they were happy to have me there." But according to petitioner, Ms. Mosely went on to tell petitioner that, "I needed to take this HIV class and teach it the way the County wanted it to be taught," whereupon "I explained to her that I would not do that. And she said, 'If you don't do that, you will be terminated.'" Petitioner answered: "And I said to her, 'Well,

then, why don't you terminate me right now.' And she said, 'We can't do that yet, but we will. We will.'" *Id.*

Thereafter, in mid-November, 1993, petitioner filed a grievance with the County's Affirmative Action Office, formally requesting that she be excused from training minors at Juvenile Hall on the proper use of condoms, etc. because this conflicted with her religious beliefs. ER, vol. 6, TAB 2 at 39.

During August and September, 1993, petitioner's first two months on the job, there had been no suggestion of any performance deficiencies. On the contrary, Ms. Mosely had been complimentary (*supra*) and Ms. Williams too had told petitioner that she was "progressing very well" and that "[e]verybody there at Juvenile Hall liked" her (*See,* ER, vol. 4, TAB 2, at 131). Even as late as her filing her grievance in November, 1993, no one had complained to petitioner about her performance (*Id.* at 145). But County witnesses contradicted petitioner on this score at trial, when Ms. Williams claimed to have spoken to petitioner between five to ten times about alleged charting problems – despite making no written record of these alleged discussions, about which petitioner's personnel file was silent (*see* ER, vol. 2, TAB 2, at 137-38). Ms. Mosely also claimed at trial that she met with Ms. Williams about petitioner's alleged performance problems more than a dozen times between petitioner's hiring and her transfer in January, 1994; that she had found errors in petitioner's charts; and that, although she never spoke with petitioner about these deficiencies, she had been told by Ms. Williams that the latter had been counseling petitioner about them (*see* ER vol. 3, TAB 2, at 101-03, 105, 106). Later at trial, a memorandum surfaced which had been prepared by Ms. Williams, detailing petitioner's

alleged performance deficiencies, which was dated December 16, 1993 – immediately following petitioner's filing of her grievance with the County, which petitioner had never seen while employed (*see,* ER, vol. 2, at 139, vol. 4, at 145-46).

Late in December, 1993, petitioner's supervisors advised her that she was being transferred from the day shift at Juvenile Hall to the night shift at Orangewood Children's Home, where abused and neglected children were housed. The official transfer occurred on January 17, 1994. (*See,* ER, vol. 3, TAB 1, at 122; vol. 6, TAB 2, at 57; vol. 3, at 122). Petitioner objected to this night shift assignment, as she was a single mother with a very young child with a difficult child-care situation at that time. But she was told by Ms. Mosely that if she didn't accept the transfer, she would be terminated or could resign (ER, vol. 4, TAB 2, at 161-62). Petitioner asked Ms. Mosely if there were any day-shift positions available, whereupon Ms. Mosely told her that she wanted petitioner to remain under her supervision (*id.*). Ms. Mosely also testified, "I had a personal belief that you didn't transfer a problem . . . so that option [referring to a day shift transfer under another supervisor] was dismissed." (ER, vol. 3, TAB 2, at 117). Forced to choose between Orangewood and losing her job, petitioner agreed to go to Orangewood but testified that she signed onto the transfer under the duress of having been threatened with immediate loss of her job if she didn't sign ("she said if I didn't accept it, I would be terminated or I could self-resign" (Tr. Transcript, pp. 600-01; ER, vol. 4, TAB 2, at 163).

Orangewood, however, proved horrendous for petitioner. That she received a pay increase commensurate with night shift work, keeping her CCN-I status and her

same probationary status date, paled to insignificance from petitioner's standpoint. At the outset, her stress and upset over difficulties stemming from the transfer brought on a bout of violent vaginal hemorrhaging, requiring surgery and a seven-week medical leave, lasting from January 27 through March 9, 1994. *Id.,* at 166, 168; *see* ER vol. 4, TAB 1, at 13.

Petitioner's forced transfer, purportedly an "accommodation" for her religious objections to advocacy of condom and dam use by minors at Juvenile Hall, rather bore the indicia – as reflected by petitioner's testimony and evidence – of retaliation. The County *required* institutional nursing experience for Orangewood nurses that petitioner, as a CCN-I level nurse, lacked (*See,* ER, vol. 6, TAB 2, at 161); yet, during the night shift at Orangewood, when no physician was on duty, only CCN-II and CCN-III nurses were assigned, all of whom were required to have one year experience as a registered nurse, six months of which was spent in a correctional, dependent care or psychiatric setting (*see, id.*; *see also,* ER, vol. 3, TAB 1 at 72).

Also, petitioner lacked the pediatric training possessed by her peers at Orangewood. Whereas Juvenile Hall housed only youth offenders, usually teenagers, many of the neglected and abused children at Orangewood were extremely young, even just a few days old. Thus it was extremely beneficial, and arguably necessary, for Orangewood nurses to have pediatric training. *See,* ER, vol. 3, TAB 1, at 70; vol. 4, TAB 2, at 165.

Nor was she ever given a proper orientation as to the unique challenges posed by her sudden transfer to the different environment at Orangewood. Petitioner only worked some 14 or 15 days at Orangewood (ER, vol. 4,

TAB 1, at 24), during which time she testified that she never received any orientation on administration of medications (ER, vol. 4, TAB 2, at 170). While petitioner's supervisor at Orangewood, Ms. Karen Adams, contradicted petitioner's testimony, claiming that petitioner received extensive orientation, Ms. Adams also testified that a set of notes and logs were kept with regard to orientation but claimed that she destroyed these notes a few weeks prior to learning about petitioner's filing suit (*see,* ER, vol. 4, TAB 1, at 14, 14-15, 16-27).

Worse for petitioner, her co-workers at Orangewood had been told about her religious objection to the HIV protocol and abortion scheduling at Juvenile Hall. As soon as she returned to work after her medical leave, petitioner was ridiculed for her beliefs. In April, 1994, she had a lesion removed from her nose, after which other nurses began to call her "Mother Mary Carcinoma Face" (*see,* ER, vol. 4, TAB 2, 174, 176-77). Witness Vija Rekte testified that petitioner was scorned, ridiculed, and "judged" by co-employees because of her Catholic beliefs (Tr. Transcript, pp. 771-73). Co-employee at Orangewood Diane Henderson also testified about other employees' giving petitioner anti-Catholic "nicknames," ridiculing her, despite supervisor Karen Adams denying any negative gossip about petitioner at Orangewood (Transcript, pp. 473, 549-52). Medical expert Giner Varga also testified that, based on her investigation of the medical records and evaluations, petitioner was rated and evaluated *differently* from other nursing employees.

At Orangewood, petitioner was asked once more to prepare a child for an abortion. On her refusal, another nurse confronted her violently. *Id.,* at 175-76. When she reported the incidents to Ms. Adams, her supervisor, the

latter refused to take any action, claiming she did nothing about the insulting nickname because petitioner "called herself that" and felt no remedial action was needed (*Id.*, at 38-39, 178).

Finally, on June 8, 1994, petitioner was fired. Although Ms. Adams, the Orangewood supervisor concurred, the termination decision was made by Ms. Mosely – the same supervisor who had told petitioner earlier that if she didn't agree to teach minors in compliance with the County's HIV protocol, she would be terminated (*supra*; ER, vol. 6, TAB 2, at 154).

After close of petitioner's case, the County's trial counsel moved for judgment as a matter of law (directed verdict), pursuant to Rule 50. Counsel dismissed petitioner's evidence of discrimination on the ground that it emanated from her own testimony: "The evidence in support of the notion that there was actual discrimination here is nonexistent, save and except for Ms. Kelly's very limited testimony even on this point" (Tr. Transcript, April 10, 2002, p. 29). What was dispositive, counsel argued, was that petitioner had failed to meet the standard requiring "more than a scintilla of evidence . . . some substantial evidence" (*id.*, p. 28).

The trial court ruled from the bench that, while "this plaintiff holds her religiously held beliefs very strongly," there was "no doubt she was a probationary employee during the subject time here," and it had no obligation to furnish her with oral notice or written evidence of its performance assessments ("no obligation to reprimand"), "other than not to discharge her for discriminatory reasons" (*id.*, p. 35; App. 10a). The court concluded: "I don't find any evidence, at least enough to go to the jury on that,

and I'm going to grant the Rule 50(b) [*sic*] motion as a matter of law" (*id.*). The court's judgment corrected the Rule reference to Rule 50(a) (App. 5a-6a).

On appeal, a Ninth Circuit panel affirmed (App. 1a-3a). The court held it "assume[d] that [petitioner] established a prima facie case" of religious discrimination, upon which "the burden shifts to the employer 'to show that it initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship.'" App. 2a. The court then ruled that because petitioner "concedes that the transfer eliminated the conflict between her job duties and her religious convictions," its "inquiry reduced to whether the accommodation reasonably preserved Kelly's compensation, terms, conditions and privileges of employment . . . a fact-intensive inquiry" (*id.*).

Here, the panel concluded that "the facts point so strongly in favor of the County that no reasonable jury could reach a verdict in [petitioner's] favor," citing Rule 50(a)(1). It went on to deem it "undisputed" that petitioner "accepted the transfer, that her job title remained the same, that she received an increase in pay rate, that she requested and received a decrease in hours, and that her new job was appropriate for a nurse with some degree of experience and training" (*id.*). As for the "factual disputes" that petitioner would have submitted to the jury, "[e]ven if [petitioner] created genuine disputes as to these facts and the disputes were resolved in her favor, the *transfer would not constitute a sufficiently adverse change in the terms, conditions, and privileges of Kelly's employment* to make the accommodation unreasonable under Title VII" (italics added). Not only is "a lateral transfer or change or job assignments . . . a means of reasonable accommodation,"

but also the "employee has a duty to cooperate in the accommodation process" (App., 3a). Thus as a matter of law, "the facts [petitioner] raised would not make the accommodation unreasonable" (*id.*).

The court of appeals panel said nothing about the non-economic factors about which petitioner adduced proof at trial. Nothing was said about the threats that she would be discharged if she didn't comply with the County's teaching protocol. Nothing was addressed with respect to the retaliatory harassment she suffered. Nothing was mentioned about her having "accepted" the transfer under duress – a single mother having been threatened with the Hobson's choice of either discharge or self-resignation [*sic*], on one hand, or acceptance of the transfer to the night shift in a job for which she was neither trained nor qualified, and in which she was mocked and harassed again on account of her religious views, and then discharged by the same supervisor who'd threatened her with discharge on the basis of her religious objections before her transfer.

The panel's "assuming" that petitioner had presented a *prima facie* case, moreover, undercut the very decision it affirmed – the granting of the County's Rule 50 motion on the ground that petitioner had *failed* to present a *prima facie* case. And its curt dismissal of *some* of petitioner's factual disputes as unworthy of presentation to jurors ignored the "totality of factors" including non-economic factors that proved petitioner's treatment was indeed discriminatory and infected with anti-religious animus. Why those issues, raised by petitioner's own testimony, were deemed unworthy of jury consideration was nowhere addressed by the panel. It was for the jury, not the trial judge or the appellate panel, to pass on petitioner's credibility as

against the credibility of the County witnesses who contradicted her testimony.

REASONS FOR GRANTING THE PETITION

This case involves a pair of recurring, critical issues that have arisen, and often proved decisive, in a host of cases brought under Title VII as well as other federal employment discrimination laws. The Circuits have been split on the initial question presented, as to whether some tangible economic adverse consequence must be proved in order for a discrimination plaintiff to make a *prima facie* case. As in the decision below, too often the courts have ruled that egregious cases of disparate treatment of employment discrimination plaintiffs are not cognizable under Title VII, or other federal discrimination statutes. This, despite repeated declarations from this Court that Congress' anti-discrimination mandates have been broad and unconfined to tangible economic matters. And these decisions – as in this case, where plaintiff's clear, specific testimony about the non-economic threats and other harassment she suffered on account of her religious objections to the County's policies was ignored or brushed aside – flout the manifest will of Congress that *all* employment practices be scrutinized to assure that *all* employees may pursue their jobs without discrimination on any of the grounds proscribed by Title VII or other federal employment discrimination laws.

Linked closely to this first issue is the related question, as to how and when employment discrimination plaintiffs are entitled to have the factual disputes they raise decided by juries of their peers, rather than by trial

or appellate judges. As in the decision below, too often courts have weighed issues of credibility, resolving contested factual issues arising out of the testimony of opposing witnesses. Here, plaintiff's testimony – although contradicted in material part by defense witnesses – should have been assessed by the jury, and not by the trial judge, or by the Ninth Circuit panel which went so far as to hold that plaintiff had made out a *prima facie* case, but then held – in the teeth of her explicit testimony about threats and harassment – that no rational jury could find in her favor. This result conflicts with this Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and should be reversed. Plaintiff's claims deserve a hearing before a jury.

I. This Court Should Resolve the Conflicts Among the Circuits Over Whether Title VII Claimants Must Prove They Suffered "Sufficiently Adverse" Tangible Economic Harm in Order to Make a *Prima Facie* Case.

This case epitomizes an unfortunate trend among federal appellate courts, by which both the text and legislative history of Title VII have been subverted, as by the decision below, when courts have superimposed on the statute an additional requirement for plaintiffs to make out a *prima facie* case, namely, that the challenged employer action have effected some tangible economic harm on the plaintiff. In these cases, unless a plaintiff has proved a "sufficiently adverse" impact – to use the phrase adopted by the Ninth Circuit panel below – stemming from the allegedly discriminatory conduct of the employer, courts have held that Title VII has not been violated.

But no such requirement appears on the face of Title VII. Indeed, the entire spectrum of employment practices has been held subject to the non-discrimination mandate enacted by Congress. The correct broad interpretation of the statute has been upheld – in conflict with decisions such as the Ninth Circuit panel's decision in this case – by the First Circuit, the Tenth Circuit, and the Eleventh Circuit.

Thus in *Welsh v. Derwinski,* 14 F.3d 85, 86 (1st Cir. 1994), the First Circuit held that the reduction of an employee's duties, prior to a desk audit, which eliminated the employee's potential for a status upgrade, constituted adverse action which would support a Title VII claim – even though there was no immediate adverse tangible economic impact on the plaintiff.

Similarly, the Tenth Circuit has construed the so-called "adverse action" element of a *prima facie* claim for retaliation under Title VII liberally. *See, e.g., Corneveaux v. Cuna Mut. Ins. Group,* 76 F.3d 1498, 1507 (10th Cir. 1996), concluding that a former employee established a retaliation claim under the analogous Age Discrimination Act anti-retaliation provision when she had to "go through several hoops in order to obtain her severance benefits." Going through the hoops *per se* was recognized as "sufficiently adverse" action by the employer, on a discriminatory basis.

And also the Eleventh Circuit has broadly construed the adverse action element of retaliation cases under Title VII. *See, Bass v. Board of County Commissioners, Orange County, Florida,* 242 F.3d 946, 1015 (11th Cir. 2001). There the court concluded that five of the plaintiff's charges,

taken collectively, rose to the level of an adverse action which supported a Title VII claim.

Here, the Ninth Circuit panel's ruling ignored the testimony of the petitioner that she was threatened with discharge, unless she recanted her religious objections to the County's protocol for advocating and teaching the use of condoms and dams – concededly in breach of petitioner's good faith religious practice, observance and belief. This testimony alone warranted a full trial, as even the Ninth Circuit "assumed" that plaintiff had made out a *prima facie* case. Yet, it then affirmed the trial court's ruling preempting her from obtaining a jury verdict, to which she was entitled in keeping with Congress' broad statutory text in Title VII and in fulfillment of Congressional intent.

II. This Court Should Reverse the Decision Below As It Conflicts In Principle with *Reeves v. Sanderson Plumbing* and Remand So That Petitioner May Present Her Claims To the Jury.

Closely linked to the first question presented herein is the question whether the trial court's preemptive ruling, entering judgment as a matter of law under Rule 50(a), as affirmed by the Ninth Circuit, conflicts in principle with this Court's ruling in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). In *Reeves*, this Court ruled unanimously that in ruling on a Rule 50 motion, "the court should review all of the evidence in the record" (*id.* at 150). "In doing so, however, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence" (*id.*). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences

from the facts are jury functions, not those of a judge" (*id.*).

Here, it is patent that the courts below disregarded the adverse non-economic impact of the threats and retaliatory harassment that the respondent and its supervisors inflicted on the petitioner and tolerated on the part of other co-employees. In the alternative, the trial judge and the Ninth Circuit panel must have weighed the credibility of petitioner as against those supervisors who testified against her. Clearly, it was not for the courts to make such determinations. It was for the jury. By the same token, granting *arguendo* the Ninth Circuit's "assumption" that plaintiff made out a *prima facie* case, how then could it affirm the granting of a Rule 50(a) motion, to the effect that she had not adduced sufficient proof to make out such a *prima facie* case. Petitioner was entitled to a jury trial, to have a decision on the merits of the factual questions that she raised rendered by her peers.

As a Second Circuit panel observed in *Gallagher v. Delaney,* 139 F.3d 338 (2d Cir. 1998), because federal judges usually live "in a narrow segment of the enormously broad American socio-economic spectrum," they generally lack "the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications." (*Id.* at 342). The same sort of dynamics are present in all these cases involving claims of retaliatory animus in the workplace and, for this reason, Congress provided for jury trials whenever plaintiffs make out *prima facie* cases, as petitioner did below. As in *Gallagher, supra,* juries and not judges should decide what is and is not proper behavior in the workplace. (*Id.* at 342-43).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAREN ANN F. KELLY, Plaintiff-Appellant, v. COUNTY OF ORANGE, Defendant-Appellee.	No. 02-56003. D.C. No. CV-95-08045-TJH MEMORANDUM* (Filed Jun. 8, 2004)

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, District Judge, Presiding

Argued and Submitted May 14, 2004
Pasadena, California

Before: TASHIMA, McKEOWN, and BYBEE, Circuit Judges.

Karen Ann F. Kelly appeals from the district court's grant of judgment as a matter of law in favor of the County of Orange on her claim that the County failed to accommodate reasonably her religious beliefs in violation of 42 U.S.C. §§ 2000e(j), 2000e-2(a)(1). *See EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 613-14 (9th Cir. 1988). In bringing a failure-to-accommodate claim, the

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

employee must first establish a prima facie case of religious discrimination; if the employee succeeds, the burden shifts to the employer "to show that it initiated good faith efforts to accommodate reasonably the employee's religious practices or that it could not reasonably accommodate the employee without undue hardship." *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004) (citations and internal quotation marks omitted). We assume that Kelly established a prima facie case and address [sic] the second step in the analysis.

Because Kelly concedes that the transfer eliminated the conflict between her job duties and her religious convictions, our inquiry reduces to whether the accommodation reasonably preserved Kelly's compensation, terms, conditions, and privileges of employment. *Am. Postal Workers Union v. Postmaster Gen.*, 781 F.2d 772, 776-77 (9th Cir. 1986). Although this is a fact-intensive inquiry, *see, e.g., Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439-40 (9th Cir. 1993), we conclude that, in this case, the facts point so strongly in favor of the County that no reasonable jury could reach a verdict in Kelly's favor. FED. R. CIV. P. 50(a)(1). It is undisputed that Kelly accepted the transfer, that her job title remained the same, that she received an increase in pay rate, that she requested and received a decrease in hours, and that her new job was appropriate for a nurse with some degree of experience and training.

Kelly contends that she was underqualified for her new position and consequently was set up for discharge on purportedly nondiscriminatory grounds. In particular, she claims that she raised several factual disputes that should have been submitted to the jury: (1) whether the County assigned her to the evening shift in contravention of its policy to assign only more experienced nurses to that shift;

(2) whether it was beneficial for nurses at Orangewood to have pediatric training, which she did not have; and (3) whether she never received orientation at Orangewood, particularly orientation for the administration of medications.

Even if Kelly created genuine disputes as to these facts and the disputes were resolved in her favor, the transfer would not constitute a sufficiently adverse change in the terms, conditions, and privileges of Kelly's employment to make the accommodation unreasonable under Title VII. *Cf. Hudson v. Western Airlines, Inc.*, 851 F.2d 261, 266 (9th Cir. 1988) (citing 29 C.F.R. § 1605.2(d)(1)(iii) for the proposition that a lateral transfer or change of job assignments is a means of reasonable accommodation). The employee has a duty to cooperate in the accommodation process. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986); *Am. Postal Workers*, 781 F.2d at 777. In light of this duty, as a matter of law, the facts Kelly raised would not make the accommodation unreasonable.

AFFIRMED.

APPENDIX B

JUDGMENT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

.....

NO. 02-56003
CT/AG#: CV-95-08045-TJH

KAREN ANN F KELLY

Plaintiff-Appellant

v.

COUNTY OF ORANGE, esa City of Orange,
Health Care Services

Defendant-Appellee

.....

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered 6/8/04

APPENDIX C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

KAREN ANN F. KELLY, Plaintiff, v. COUNTY OF ORANGE, HEALTH CARE SERVICES Defendant.	No. CV-95-8045-TJH (AJWx) **JUDGMENT** (Filed Apr. 30, 2002)

This action came on regularly for trial on April 2, 2002, in Courtroom 17 of the United States District Court, Central District of California, before the Honorable Terry J. Hatter, Chief District Judge presiding; the plaintiff, Karen Kelly, appearing by attorneys Thomas Nigro and Elizabeth Nigro, Nigro & Nigro and the Defendant, County of Orange, appearing by attorneys Norman J. Watkins and Yolanda A. Slaughter, Lynberg & Watkins, A Professional Corporation.

A jury of seven (7) persons was regularly impaneled and sworn. Witnesses were sworn and testified. At the close of plaintiff's case and after the plaintiff rested on April 10, 2002, defendant moved for a Judgment As A Matter of Law pursuant to *Federal Rule of Civil Procedure* 50(a). After hearing the arguments of counsel, the Court ruled as follows:

The evidence was clear that plaintiff, Karen Kelly, had firmly held religious beliefs;

The evidence was undisputed that plaintiff was a probationary employee with defendant County of Orange and as such the County of Orange was free to release the plaintiff from probation so long as the decision was not for discriminatory purposes; and

Pursuant to *Federal Rules of Civil Procedure*, Rule 50, plaintiff failed to meet her burden of proving that her religion was a substantial, motivating factor in the County of Orange's decision to release her from new employee probation.

IT IS ORDERED AND ADJUDGED that the Clerk of the Court shall: (1) enter judgment in favor of defendant County of Orange and that plaintiff takes nothing; (2) that the action be dismissed on the merits; and (3) that defendant County of Orange recover its costs of action.

IT IS SO ORDERED.

4/30/02 /s/ Terry J. Hatter
HONORABLE TERRY J. HATTER
CHIEF DISTRICT JUDGE OF THE
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KAREN ANN F. KELLY, Plaintiff-Appellant, v. COUNTY OF ORANGE, esa City of Orange, Health Care Services, Defendant-Appellee.	No. 02-56003 D.C. No. CV-95-08045-TJH Central District of California, Los Angeles ORDER (Filed Aug. 5, 2004)

Before: TASHIMA, McKEOWN, and BYBEE, Circuit Judges.

The panel judges have voted to deny Appellant's petition for rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and petition for rehearing en banc, filed July 9, 2004, is DENIED.

APPENDIX E

Name/Address of ~~Attorney or~~ Pro Per	
Karen Ann F. Kelly 1161 Packers #104 Tustin, California 92780-3558 Telephone (714) 832-7599 ☐ FPD ☐ Apptd ☐ CIA ☒ Pro Per ☐ Retained	

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Karen Ann F. Kelly PLAINTIFF(S), v. County of Orange DEFENDANT(S).	CASE NUMBER: (Filed May 30, 2002) Central Dist. Ct No. 95-CV-8045 (TJH) NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Karen Ann F. Kelly (Name of Appellant) hereby appeals to the United States Court of Appeals for the Ninth Circuit from:

CRIMINAL MATTER	CIVIL MATTER
☐ Conviction only [F.R.Cr.P. 32(b)]	☐ Order (Specify) _____
☐ Conviction and Sentence	☒ Judgment (specify) of Chief District Wage of U.S. District Court Honorable Terry J. Hatter, re: FRCP 50(A)
☐ Sentence only (18 U.S.C. 3742)	

☐ Pursuant to F.R.Cr.P. 32(c)(5)

☐ Other (specify) _____

☐ Interlocutory Appeals: ___

☐ Sentence imposed: _____

☐ Bail status: _____

Entered in this action on May 1, 2002 (Date Judgment or Order Entered on the Docket Sheet). A copy of said judgment or order is attached hereto.

5/30/2002
Date

(Checkone)

☒ Appellant/Pro Se

/s/ Karen Ann F. Kelly
Signature Karen A. Kelly

☐ Counsel for Appellant ____

☐ Deputy Clerk

NOTE: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

APPENDIX F

[Excerpt from Trial Transcript, Oral Ruling by Judge Terry J. Hatter, U.S. District Judge, on Motion for Directed Verdict – Wednesday, April 10, 2002, pp. 34-35]

[34] THE COURT: Thank you.

I don't think there's any doubt. I'm sure there is no opposition to the fact that the defendant holds her religious beliefs.

There is also no doubt that this defendant – excuse me, this plaintiff, rather, this plaintiff holds her religiously held beliefs very strongly, no doubt that she was a probationary [35] employee during the subject time here.

The County had no obligation to reprimand, do anything other than not discharge her for discriminatory reasons, and I don't find any evidence, at least enough to go to the jury on that, and I'm going to grant the Rule 50(b) motion as a matter of law, judgment as a matter of law. Thank you.

(Proceedings concluded at 10:29 a.m.)

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Supreme Court, U.S.
FILED
FEB 4 - 2005
OFFICE OF THE CLERK

No. 04-614

In The Supreme Court of the United States

KAREN ANN F. KELLY,

Petitioner,

vs.

COUNTY OF ORANGE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR REHEARING

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**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly held, in conflict with decisions from the First, Tenth, and Eleventh Circuits, as well as within its own Circuit, that a Title VII plaintiff claiming religious discrimination by means *inter alia* of threats and retaliation must prove that the employer's decision to transfer her was "sufficiently adverse" in tangible economic terms to make a *prima facie* case, absent which her evidence as to non-economic factors such as retaliatory animus, severe harassment and threats of discharge on account of her religious practice, observance and belief were disregarded.

2. Whether the decision below, affirming the grant of a directed verdict (judgment as a matter of law) against petitioner, pursuant to Federal Rule of Civil Procedure 50(a), conflicted in principle with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), and usurped the role of the jury, in that the Courts below did not review all the evidence plaintiff adduced, did not draw all reasonable inferences in her favor, and failed to disregard all evidence favorable to the moving party that jurors would not have been required to believe.

PETITION FOR REHEARING

I. This Court Should Grant A Rehearing To Resolve The Persistent And Deepening Conflict Among And Even Within The Circuits Over Whether Title VII Claimants Must Prove They Suffered "Sufficiently Adverse" Tangible Economic Harm In Order To Make A *Prima Facie* Case.

On January 10, 2005, this Court entered an Order denying the petition for writ of certiorari in this case. Thus petitioner now timely urges that the Court grant a rehearing in this matter, in order to resolve an inter-Circuit conflict that has continued, and deepened, even since the filing of the petition in this case. That conflict, furthermore, has caused a great deal of disarray in the relevant jurisprudence under Title VII of the Civil Rights Act of 1964, as amended. No doubt it will persist and may become entrenched, if it is not already, unless and until this Court steps in to resolve the conflict and bring order to this vast corpus of case law.

Here, the Ninth Circuit panel below had held that when petitioner was transferred to the evening shift at a different facility, to perform a job for which she was not trained or qualified, and for which she did not receive a proper orientation, "[e]ven if [she] created genuine disputes as to these facts and the disputes were resolved in her favor, the transfer *would not constitute a sufficiently adverse change in the terms, conditions, and privileges of [petitioner's] employment* to make the accommodation unreasonable under Title VII" (Petition for Certiorari, Appendix, 3a; emphasis supplied). What the Court below held dispositive, again, were tangible economic factors: "It is undisputed that [petitioner] accepted the transfer, that

her job title remained the same, that she received an increase in pay rate, that she requested and received a decrease in hours, and that her new job was appropriate for a nurse with some degree of experience and training" (*Id.*, p. 2a).

True, cases in the Fifth and Eighth Circuits, handed down since the filing of the petition in this case suggest that, as the court put it in *Brazoria County v. EEOC,* 391 F.3d 685 (5th Cir. 11/9/04), the adverse employment action sufficient to support a Title VII claim must be an ultimate employment decision: "For the claimed ostracism, the retaliatory activities did nothing more than affect conditions in the workplace. None of the events [charged as retaliatory] are akin to the 'hiring, granting leave, discharging, promoting, and compensating' examples listed in *Mattern [v. Eastman Kodak,* 104 F.3d 702, 707, cert. den., 522 U.S. 932]." *Brazoria Cty.,* 391 F.3d at 693. *See also, Okruhlik v. University of Arkansas,* 2005 U.S. LEXIS 1140 (Jan. 24, 2005), reaffirming the Eighth Circuit's position, as stated in *Duncan v. Delta Consolidated Indus.,* 371 F.3d 1020, 1026 (8th Cir. 2004), quoting *Spears v. Mo. Dep't of Corres. & Human Res.,* 210 F.3d 850, 853 (8th Cir. 2000): "A plaintiff suffers an adverse employment action when the action results in a 'material employment disadvantage' such as 'termination, reduction in pay or benefits, and changes in employment that significantly affect an employee's future career prospects.'"

On the other hand, in addition to the cases from the First, Tenth and Eleventh Circuits cited in the Petition, which take a far more liberal view of what constitutes the necessary "adverse action" to support a Title VII claim (Pet., pp. 14-15), even within the Ninth Circuit itself there is substantial jurisprudence to the contrary of what the panel held below. In *Ray v. Henderson,* 217 F.3d 1234,

1241 (9th Cir. 2000), the court observed, "The circuits are currently split as to what constitutes an adverse employment action. Although we have yet to articulate a rule defining the contours of an adverse employment action, our prior cases situated us with those circuits that define adverse employment action broadly. Other circuits that define adverse employment action broadly are the First, Seventh, Tenth, Eleventh and D.C. Circuits. An intermediate position is held by the Second and Third Circuits. The most restrictive view of adverse employment actions is held by the Fifth and Eighth Circuits." The court went on to expound on the details of the contradictory holdings on this critical essential issue in all Title VII and other employment discrimination litigation. *Id.*

Without more, we must urge this Court to consult a number of recent comprehensive law review articles that canvass the details of this conflict in the jurisprudence, which clearly support the grant of rehearing herein and the plenary review of this case, as a proper vehicle for resolution of this pressing issue in employment discrimination law. *See generally, e.g.,* R. Levinson, "Parsing the Meaning of 'Adverse Employment Action' in Title VII Disparate Treatment, Sexual Harassment, and Retaliation Claims: What Should Be Actionable Wrongdoing," 56 Okla. L. Rev. 623 (Fall, 2003); J. Kravetz, "Deterrence v. Material Harm: Finding the Appropriate Standard to Define an 'Adverse Action' in Retaliation Claims Brought Under the Applicable Equal Employment Opportunity Statutes," 4 U. Pa. J. Lab. & Emp. L. 315 (Winter, 2002); E. Lidge, "The Meaning of Discrimination: Why Courts Have Erred in Requiring Employment Discrimination Plaintiffs to Prove That the Employer's Action Was Materially Adverse or Ultimate," 47 Kan. L. Rev. 333 (January, 1999).

CONCLUSION

Clearly, this conflict on such a key issue in all of employment discrimination law must ultimately be resolved, or there will be a different civil rights law prevailing in different parts of the United States. This case, in which so much contradictory testimony was brushed aside in the trial court's preemptive ruling against the petitioner and in the Ninth Circuit's cursory review of the record, offers a prime opportunity for this Court to strike order from what increasingly appears to be a chaotic area of federal law – an area, moreover, which represents a very substantial portion of the business of our federal courts.

Respectfully, therefore, Petitioner urges that this Court grant her a rehearing, and that it grant the petition for writ of certiorari herein.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Thomas Brejcha hereby certifies that he is counsel of record herein for the Petitioner, Karen Ann Kelly; that pursuant to Rule 44(1) of this Court, he also certifies that this petition for rehearing is filed in good faith and not for delay; and that pursuant to Rule 44(2) of this Court, he further certifies that the grounds urged for rehearing herein have been limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

_____

Counsel for Petitioner

APPENDICES

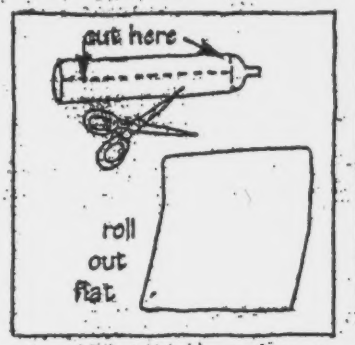
Appendix 1 – Diagram "Using Latex Barriers".....App. 1

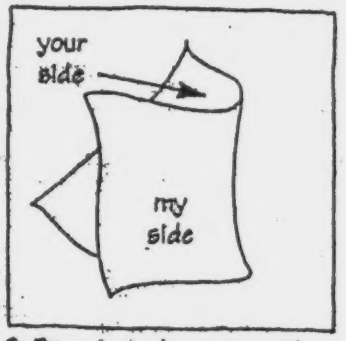
Appendix 2 – "Using Condoms" .....App. 2

(Both pages excerpted from ER III, HIV Training Materials, to the use of which Petitioner objected)

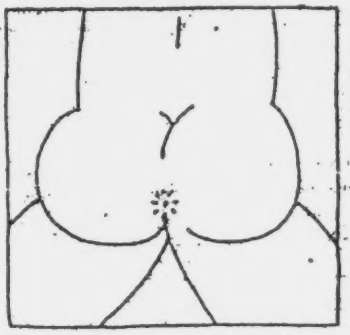
USING LATEX BARRIERS

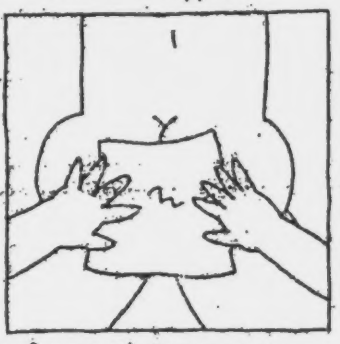
1. Latex dams are flat squares of latex rubber. They can be placed against a woman's vagina during mouth-to-vagina sex, or against a woman's or man's anus during mouth-to-anus sex. The dam keeps fluids from being shared between sex partners. It is believed latex dams can prevent HIV and other sexually transmitted diseases. To make a dam, cut down a non-lubricated condom so it lies flat. Or buy dental dams from dental supply houses or stores that sell sexual supplies.



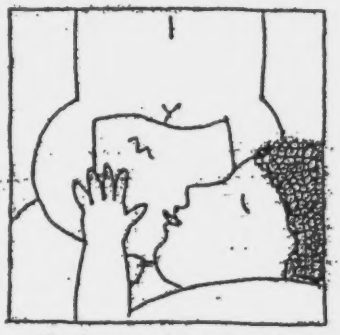


2. Be sure to keep one side towards you and the other side towards your partner.





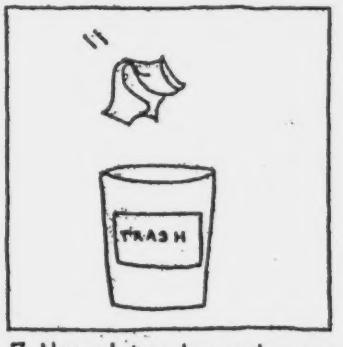
3. Place the dam over the anus for mouth-to-anus sex.



4. Don't use the same dam for anal, and then vaginal, sex.

5. Place the dam over the vaginal lips for mouth-to-vagina sex.

6. Don't use the same dam for anal, and then vaginal, sex.

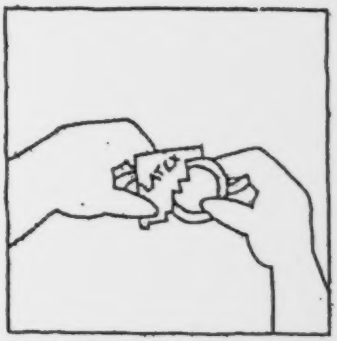


7. Use a latex dam only once and then throw away. Throw into trash, not down toilet.

From Quackenbush M, Benson JD, Ehrald J. *Risk and Recovery: AIDS, HIV and Alcohol.* San Francisco: UCSF AIDS Health Project, 1982. May be reproduced for educational purposes.

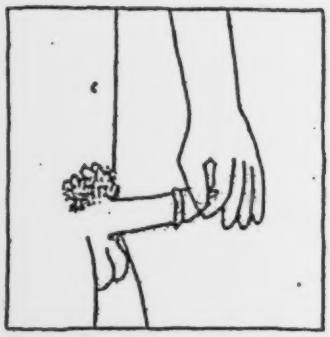
BEST AVAILABLE COPY

USING CONDOMS

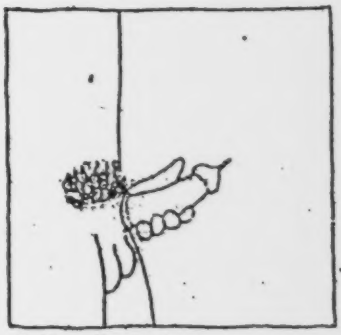


1. Use latex condoms. Open package carefully.

2. Put condom on erect (hard) penis.



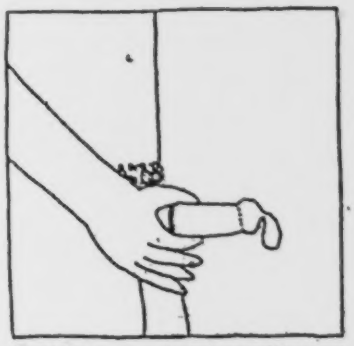
3. Press air out of tip of condom.



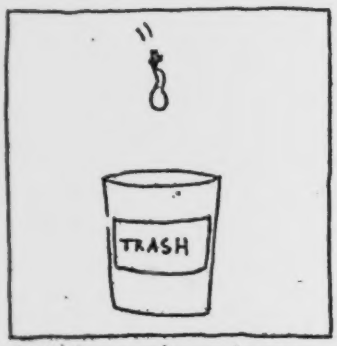
4. Unroll condom and cover whole penis.

5. Always use water-based lubricant to help keep condom from breaking. Never use oil-based lubricants.

6. Hold condom at base during insertion.



7. After sex, hold condom at base and pull out gently before penis gets soft.



8. Use a condom only once and then throw away. Throw into trash, not down toilet.

From Quackenbush M, Benson JD, Rinaldi J. *Risk and Recovery: AIDS, HIV and Alcohol.* San Francisco: UCSF AIDS Health Project, 1992. May be reproduced for educational purposes.